Supreme Court, U. S.
FILED
FEB 8 1980
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-1230

GILLIAM RAYMOND COATS, *Petitioner*

v.

UNITED STATES OF AMERICA, *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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February 8, 1980

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The Petitioner, Gilliam Raymond Coats, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fourth Circuit entered on the 29th day of November, 1979.

OPINION BELOW

The opinion of the Court of Appeals for the Fourth Circuit, not yet reported, appears in the Appendix hereto as Exhibit A. The order of the Court of Appeals denying the Petitioner's motion for rehearing en banc

appears in the Appendix as Exhibit B. No opinion was rendered by the District Court for the Eastern District of North Carolina. The District Court adopted the recommendations of the Magistrate on the Petitioner's motion to suppress evidence obtained as a result of an illegal search which are attached in the Appendix as Exhibit C. The District Court also adopted the Magistrate's findings and conclusions relating to the Petitioner's challenge to the Jury Selection Plan for the Eastern District of North Carolina which are attached as Exhibit D in the Appendix.

JURISDICTION

The judgment of the Court of Appeals for the Fourth Circuit was entered on the 29th day of November, 1979. A timely petition for rehearing en banc was denied on January 10, 1980, and this petition for certiorari was filed within thirty (30) days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Is the Fourth Amendment to the United States Constitution violated if the Coast Guard randomly stops and searches American vessels on the high seas outside the jurisdictional waters of the United States for the purpose of drug interdiction under the authority granted the Coast Guard by 14 U.S.C. § 89(a)?

2. Are the Fifth and Sixth Amendments to the United States Constitution and the provisions of the National Jury Selection and Service Act of 1968 (28 U.S.C. § 1861 et seq) violated by a jury selection plan which uses as its source lists of actual voters in the

general election when use of that source results in exclusion of more than 60% of the persons eligible for jury selection and the exclusion of persons eligible results in significant and systematic under-representation of cognizable groups on the basis of race, economic status and other cognizable classifications?

3. Are the provisions of the Fifth Amendment right to due process and the Sixth Amendment right of counsel violated by the United States Attorney staging an identification of the Petitioner by having a government witness appear in the Courtroom approximately five (5) minutes before Petitioner's trial to see if he could identify the Petitioner?

4. Were the Petitioner's Fifth Amendment rights to due process of law and Sixth Amendment right to be confronted with the witnesses against him violated by the Court's allowance into evidence of a motel registration card directly linking him to the conspiracy when the card was not properly authenticated and contained matter thereon which had been changed from the time it was originally made?

5. Did the Court violate the Petitioner's Fifth Amendment rights by improperly instructing the jury and by summarizing the evidence and contentions of the government and Petitioner in favor of the government?

CONSTITUTIONAL PROVISIONS INVOLVED

UNITED STATES CONSTITUTION, Amendment Four:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue but upon probable

cause, supported by oath or affirmation and particularly describing the place to be searched and the persons or things to be seized."

UNITED STATES CONSTITUTION, Amendment Five:

"No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use without just compensation."

UNITED STATES CONSTITUTION, Amendment Six:

"In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense."

STATUTES INVOLVED

14 U.S.C. § 89(a) is set forth as Exhibit E in the Appendix hereto.

The pertinent sections of the National Jury Selection and Service Act of 1968 (28 U.S.C. §§ 1861, 1862, 1863 and 1867) are set forth in Exhibit F in the Appendix hereto.

STATEMENT OF THE CASE

Petitioner was convicted of conspiracy to import marijuana under 21 U.S.A. §§ 952(a), 960(a)(1), and 963 and was sentenced to the maximum provided by law of five (5) years imprisonment, $15,000.00 fine and a special parole term of five (5) years.

The Petitioner's arrest and conviction stemmed from evidence obtained by the United States Coast Guard as the result of a stopping, seizure and search of a United States vessel on the high seas in the Mona Passage on the 25th of January, 1978, pursuant to a drug interdiction program of the Coast Guard. (At the pre-trial suppression hearing Coast Guard officers testified that the determination of what vessels to stop rested solely with the captain of each Coast Guard Cutter.) The Fourth Circuit opinion (Appendix page 1a, 2a) sets forth the sequence of events leading up to the stopping of the vessel. The District Court determined that the petitioner did not have standing to challenge the search.

The Petitioner by appropriate motion challenged the Jury Selection Plan for the Eastern District of North Carolina and offered evidence which disclosed that the Plan used as a source of jurors those persons voting in the previous general election. In the general election of 1976, within the Eastern District of North Carolina, 544,444 persons actually voted. The Petitioner using census data showed that in 1976 there were 1,411,625 persons eligible for jury duty within the District and that by dividing the number eligible by those voting, only 38% of those eligible for jury duty were included for consideration and thereby 62% of those eligible were automatically excluded. The

Eastern District Plan does not provide an alternative method for supplementation of jurors. (Transcript of Magistrate's Hearing, September 28, 1978, page 16.)

The Petitioner also offered expert witnesses who performed a statistical analysis of the types of jurors who were chosen under the Eastern District Plan and offered evidence (based on the comparative disparity standard) which showed that blacks were 44.5% under-represented in the division where the Petitioner was tried. On the basis of economic status, persons in the lower skilled job classification were 55.1% under-represented in the trial division; persons with incomes below $7,000.00 per year were more than 33.3% under-represented in the trial division; persons with high school or less education were under-represented from 20% to 100% depending on the degree of lack of education. The statistics disclosed that persons with some college education to college graduates were between 152% to 240% overrepresented in the trial division. The Petitioner's evidence also disclosed that those persons in the age range of 18 to 24 were 49% under-represented. (Petitioner's Exhibit # 10 introduced at pre-trial hearings, September 28, 1978)

The evidence at trial disclosed that the United States Attorney met with Wiley Thompson (a prospective government witness) on several occasions including the night before the Petitioner's trial began and instructed this witness to be in the Courtroom before Court began in order to determine whether he could identify anyone. The witness Thompson testified that he remained in the Courtroom during the selection of the jury and saw the man he knew as "Jack Long" (an alias of the Petitioner) come up to the counsel table and sit with his counsel. The witness then

left and was contacted that evening by the United States Attorney and asked if he recognized anyone and was told by the witness that he recognized "Jack Long" (an alias allegedly used by Petitioner). The government made no effort to have a pretrial lineup for identification of the Petitioner by the witness.

The Court allowed into evidence a motel registration card from the Taylor Motel, a place where the main government witness testified he was directed to stay by the Petitioner. This registration card contained an automobile license number which had been marked through and another license number placed thereon which second license number was the same number of a car which the Petitioner had rented. The authenticity of the changed license number was never established by the government and the Petitioner's handwriting expert testified that the person originally filling out the registration card did not write in the different license number. The Court, over Petitioner's objection, allowed this document into evidence which was the only documentary evidence that directly linked the Petitioner with the conspiracy.

Petitioner was indicted during the month of July 1978, after eleven (11) co-defendants had been tried and convicted at a bench trial. These co-defendants' appeals are still pending before the United States Fourth Circuit Court of Appeals on issues basically the same as those presented to this Court.

REASONS FOR GRANTING THE WRIT

1. *The Fourth Amendment.* This Court should grant certiorari because 14 U.S.C. § 89(a) on its face violates the Fourth Amendment prohibition against un-

reasonable searches and seizures. The evidence in this case discloses that the Coast Guard is using this statutory authority for unrestrained, unbridled invasions of the privacy of American citizens while on the high seas. Such unbridled discretion has been proscribed by this Court in a long line of cases, the most recent of which is *Brown* v. *Texas,* —— U.S. ——, 99 S.Ct. 2637, (1979). In a similar factual situation this Court declared unconstitutional a Delaware police practice of randomly stopping automobiles, without probable cause, in order to check drivers license and registration. *Delaware* v. *Prouse,* —— U.S. ——, 99 S.Ct. 1391, (1979). In prohibiting such unrestrained seizures this Court held:

> "Accordingly, we hold that except in those situations in which there is at least articulable and reasonable suspicion that a motorist is unlicensed or that an automobile is not registered, or that either the vehicle or an occupant is otherwise subject to seizure for violation of law, stopping an automobile and detaining the driver in order to check his drivers license and the registration of the automobile are unreasonable under the Fourth Amendment.
>
> * * *
>
> As *Terry* v. *Ohio,* supra, recognized, people are not shorn of all Fourth Amendment protection when they step from their homes onto the public sidewalks. Nor are they shorn of those interests when they step from the sidewalks into their automobiles. See *Adams* v. *Williams,* 407 U.S. 143, 146 (1972)."

Certainly a reasonable extension of the *Brown* v. *Texas* and *Delaware* v. *Prouse* doctrines would also conclude that American citizens do not lose the security of the Fourth Amendment by stepping from their houses and automobiles into their boats.

The marginal contribution to boating safety of such seizures cannot justify the intrusion to the occupants which results. It is especially significant that boats in general are more than means of transportation since to many persons they constitute their homes, places of work and total environment for many days or weeks at the time and the intrusion envisioned by 14 U.S.C. § 89(a) is much greater than the intrusions which this Court has struck down in the automobile situations. *United States* v. *Martinez-Fuerte,* 428 U.S. 543 (1976); *United States* v. *Brignoni-Ponce,* 422 U.S. 873 (1975); *Terry* v. *Ohio,* 392 U.S. 1 (1968); *Marshall* v. *Barlow's, Inc.,* 436 U.S. 307 (1978) and *Camara* v. *Municipal Court,* 387 U.S. 523 (1967)

The evidence in the present case disclosed that there was no probable cause or even suspicion that the vessel which the Coast Guard boarded was involved in any illegal activity or violating any safety, navigation or documentation regulation.

The Coast Guard's actions in this matter, even when considered under the Statutory authority of 14 U.S.C. § 89(a), are unbridled intrusions as the unfettered discretion of Coast Guard personnel and under the authority of the Statute can be exercised at any time and any place in the world.

2. *Standing.* The District Court and the Fourth Circuit Court of Appeals avoided the Fourth Amendment issue by concluding that the Petitioner did not have standing to contest the search. The Circuit Court opinion goes to great length to set forth why a co-defendant named "Sam" would have standing but the Peti-

tioner would not. It is interesting to note that in the companion case tried separately from the Petitioner the same District Judge found that the co-defendant "Sam" did not have standing. The Magistrate's findings (Exhibit C of the Appendix) set forth an overwhelming number of facts which support the Petitioner's claim of standing. Based on those facts, the Magistrate, District Court and Fourth Circuit Court of Appeals held that no standing had been established by the Petitioner.

The general rule which has been established by this Court has been that a defendant must have an ownership, possessory or a privacy interest in the property that was searched. *Rackus* v. *Illinois,* 99 S.Ct. 421 (1978). However, a proprietary or possessory interest need not be exclusive; it may be shared with others and this claim may be made even though others have a superior interest in the property. *Manchusi* v. *DeForte,* 392 U.S. 364 (1968). The ultimate decision must be "whether the disputed search and seizure has infringed an interest of the defendant which the Fourth Amendment was designed to protect." *Rackus* v. *Illinois,* supra, at 429. The boat captain in describing the Petitioner's role stated:

> "It seemed to me that Sam was obviously the overboss as far as laying down what would be the proper procedure to do different things. *However, Mr. Coats' (Petitioner) responsibility was to oversee the boat and crew.*" (Parenthetical matter and emphasis supplied)

Simply stated, the question is whether the Petitioner had a legitimate expectation of privacy in the invaded place. *Katz* v. *United States,* 389 U.S. 347 (1967). The interest which a person may have which generates a

legitimate expectation of privacy does not have to be couched in arcane distinctions of property and tort law. *Warden* v. *Hayden,* 387 U.S. 294 (1967); *United States* v. *Chadwick,* 433 U.S. 1 (1977). Under the factual situation recited by the Magistrate, the Petitioner's control, authority and direction certainly established his reasonable and legitimate expectation of privacy in the boat.

3. *The Jury Selection Plan.* The National Jury Selection and Service Act of 1968, 28 U.S.C. § 1861 et seq., as well as the Fifth and Sixth Amendments require that grand and petit juries be selected from a fair-cross-section of the community. In addition, the policy provisions of the National Jury Selection act go further to provide: " . . . [I]t is a policy of the United States that *ALL* citizens shall have the opportunity to be considered for service on juries in the District Courts of the United States." (emphasis supplied) Use of a source which excludes more than 60% of those persons eligible to serve on juries can under no stretch of the imagination be rationalized to the status of a fair-cross-section. The District Court placed the blame of the inadequacy of the Plan on voter apathy while the Court of Appeals concluded that use of voter registration lists rather than lists of actual voters would still not successfully obtain a fair-cross-section. Apparently both Courts only would grant relief under the "tainted source" doctrine. However, as this Court pointed out in *Duren* v. *Missouri,* —— U.S. ——, 58 L.Ed.2d 579 (1979) it is the systematic, not merely intentional, exclusions which the Sixth Amendment addresses. *Taylor* v. *Louisiana,* 419 U.S. 522 (1975). "[T]he fair-cross-section requirement involves a comparison of the makeup of jury venires or other sources

from which juries are drawn with the makeup of the *community,* not of voter registration lists." *Duren,* 58 L.Ed.2d at 587 n.23 (emphasis in original).

Also the Fourth Circuit opinion disregards the standards established in *Duren,* supra, that: "[t]he right to a proper jury cannot be overcome on merely rational grounds. Rather, it requires that a significant state interest be manifestly and primarily advanced by those aspects of the jury-selection process, such as exemption criteria, that result in the disproportionate exclusion of a distinctive group."

Exclusion of such large percentages of the jury community through the use of lists of actual voters leads to the obvious results that significant cognizable groups will be under-represented. In 1976 the Judicial Conference proposed that a presumption be established in favor of the adequacy of voter registration (not actual voters) lists. The Attorney General opposed the establishment of the presumption on the grounds that voter registration lists do not provide for adequate representation of minority groups. Hearing before the Sub-Committee on Improvements in the Judiciary Machinery, Judiciary Committee, U. S. Senate, 95th Cong., 1st Sess. (Sept. 26, 1977), at 100-01. The use of lists of actual voters, a more restrictive list, has proven the Attorney General's position in the Eastern District of North Carolina.

The actual, practical effect of the decision of the Fourth Circuit Court of Appeals is to establish precedent for other jury selection plans across the country to completely disregard the policy provisions of the National Jury Service and Selection Act of 1968 and to erode and disregard the fair-cross-section requirements as established by this Court in *Duren* and *Taylor,* supra.

4. *The Pre-Trial Staged Identification.* The Petitioner's challenge of the government's identification of the Petitioner is two-pronged. In the first instance, it denied the Petitioner due process under *Manson* v. *Brathwaite,* 432 U.S. 98 (1977) and *Neil* v. *Biggers,* 409 U.S. 188 (1972). Secondly, it also denied the Petitioner's Sixth Amendment right to counsel under *Gilbert* v. *California,* 388 U.S. 263. It is hard to imagine a more suggestive procedure than to have a witness sitting in a Courtroom to see if he can identify the person who is called up to the bench with his counsel for trial. The process used by the government was without the knowledge of the Petitioner or his counsel and there can be no question that the government deliberately staged this identification procedure. In *Stovall* v. *Denno,* 388 U.S. 293 (1967) this Court was primarily concerned with whether the confrontation conducted was so unnecessarily suggestive and conducive to irreparable mistaken identification that the Petitioner was denied due process. It is submitted that here the confrontation could only be highly suggestive and conducive to irreparable mistaken identification.

5. *The Introduction of the Motel Registration Card Violated the Petitioner's Fifth Amendment Right to Due Process.* While the Trial Court is granted wide discretion in admission of documents as business records, there must be minimal authentication proof to give them reliability. In the present case there is absolutely no authentication of the automobile license number on the registration card which was the same number as a rental car which the Petitioner had rented. In

fact, the only handwriting expert to testify with regard to the substituted number stated that the writing of the substituted number was different from the entering clerk. The unreliability of this information, particularly in the format of the card, was sufficient basis for its exclusion. The Court, by allowing admission of the registration card, bolstered the government's case against the Petitioner by offering the only documentary evidence which directly tied the Petitioner to the other co-conspirators. The unreliability of the document under these circumstances and its importance to the government's case denied the Petitioner due process when it was introduced in evidence over his objection.

6. *The Judge's Charge to the Jury as to Contentions of the Government and the Petitioner.* Petitioner desires to preserve arguments relating to the Judge's charge in the event his petition for certiorari is granted and therefore no argument is now made as to these contentions since references to the record would be extensive.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Fourth Circuit.

Respectfully submitted,

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February , 1980

APPENDIX

EXHIBIT A

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 79-5015

UNITED STATES OF AMERICA, *Appellee,*

versus

GILLIAM RAYMOND COATS, a/k/a JACK LONG,
a/k/a BILL WALTERS, *Appellant.*

Appeal from the United States District Court for the Eastern District of North Carolina, at New Bern.
F. T. Dupree, Jr., District Judge.

Argued: July 12, 1979. Decided: November 29, 1979.

Before RUSSELL, Circuit Judge, FIELD, Senior Circuit Judge, and WIDENER, Circuit Judge.

Bobby Lee Cook (Cook & Palmour on brief) and L. Patten Mason (Mason and Phillips, P.A. on brief) for Appellant; Herman E. Gaskins, Jr., Special Assistant United States Attorney) (George M. Anderson, United States Attorney on brief) for Appellee.

RUSSELL, *Circuit Judge:*

Defendant/appellant appeals from his conviction under 21 U.S.C. §§ 952(a), 960(a)(1), and 963, of conspiracy to import marijuana. His primary contention an appeal concerns the search and seizure of the vessel used to transport the marijuana. The facts pertinent to that search and sizure may be briefly stated: in January of 1978 the United States Coast Guard was engaged in patrolling the Caribean sea lanes for general law enforcement purposes with a special emphasis on drug interdiction. On January 25th the Coast Guard Cutter ALERT spotted the LADY ELLEN, a fishing vessel of North Carolina registry, in the

Mona Passage between the Dominican Republic and Puerto Rico. Following its policy of stopping all United States vessels less than two hundred fifty (250) feet in length, the crew of the ALERT stopped and boarded the LADY ELLEN and inquired of its master the vessel's destination and point of embarkation. At that point the master stated "you got me, I'm coming from Colombia and I have a load of marijuana on board." A search ensued which produced some twenty-five (25) tons of marijuana. The crew then cooperated in a controlled delivery of the marijuana to their co-conspirators waiting in North Carolina. Ultimately, the marijuana was seized and a number of individuals, including the defendant, were arrested and charged with conspiracy to import marijuana.

Defendant contends that the search of the LADY ELLEN was unlawful and that all evidence derived from it should be suppressed. The Coast Guard admittedly had no suspicion concerning criminal activities aboard the vessel. It boarded, pursuant to authority under 14 U.S.C. § 89(a), for purposes of conducting a safety and documentation inspection, and thereafter allegedly acquired probable cause to conduct the search when the master uttered his inculpatory statement. It is the initial boarding which defendant contests.

The validity of section 89(a) boardings, which may occur virtually anywhere in the world at the discretion of the Coast Guard, presents an intriguing question when measured against Fourth Amendment standards, particularly in light of the Coast Guard's admittedly drug related policy of stopping all vessels under a certain length which are found in Carribean passages known to be used by smugglers.[1] Yet, tempted though we are, we must decline to con-

[1] 14 U.S.C. § 89(a) provides:

> The Coast Guard may make inquiries, examinations, inspections, searches, seizures, and arrests upon the high seas and waters over which the United States has jurisdiction, for the prevention, detection, and suppression of violations of laws of the United States. For such purposes, commissioned, warrant, and petty officers may at any time go on board of any vessel subject to the jurisdiction, or to the operation of any law, of the United States, address inquiries to those on board, examine the ship's documents and papers, and examine, inspect, and search the vessel and use all necessary force to compel compliance. When from such inquiries, examination, inspection, or search it appears that a breach of the laws of the United States rendering a person liable to arrest is being, or has been committed, by any person, such person shall be arrested or, if escaping to shore, shall be immediately pursued and arrested on shore, or other lawful and appropriate action shall be taken; or, if it shall appear that such a breach of the laws of the United States has been committed so as to render such vessel, or the merchandise, or any part thereof, on board of, or brought into the United States by, such vessel, liable to forfeiture, or so as to render such vessel liable to a fine or penalty and if necessary to secure such fine or penalty, such vessel or such merchandise, or both, shall be seized.

The fifth circuit, in a long line of cases, has upheld this statute. *United States* v. *Warren* (5th Cir. 1978) 578 F.2d 1058, 1064-65 (en banc); *United States* v. *One (1) 43 Foot Sailing Vessel "Winds Will"* (5th Cir. 1976) 538 F.2d 694, 694 (per curiam); *United States* v. *Hillstrom* (5th Cir. 1976) 533 F.2d 209, 210-11, *cert. denied*, 429 U.S. 1038 (1977); *United States* v. *Odom* (5th Cir. 1976) 526 F.2d 339, 342. *But see United States* v. *Piner* (N.D.Cal. 1978) 452 F.Supp. 1335, 1339-40 (unbridled discretion violates Fourth Amendment absent warrant or probable cause). The fourth and fifth circuits have approved section 89(a) stops on the high seas of foreign vessels which are subject to extra-territorial application of domestic law. *United States* v. *Dominguez* (4th Cir. 1979) —— F.2d ——, dated August 10, 1979; *United States* v. *Cadena* (5th Cir. 1978) 585 F.2d 1252, 1259. The fifth circuit also has approved, without relying on section 89(a), searches of American vessels in foreign waters. *United States* v. *Conroy* (5th Cir. 1979) 589 F.2d 1258, 1265-69, U.S. appeal pending.

sider that question since we conclude that the district court correctly denied the defendant standing to contest the validity of the search.

In *Rakas* v. *Illinois* (1978) 439 U. S. 128, the Supreme Court declared that only one who has a legitimate expectancy of privacy in property may object to a search of such

property, and, while the expectation need not rest on common-law property concepts, such property rights may often be determinative of whether a party has such expectation of privacy as to support his objection to a property search under the Fourth Amendment.[2] In this case the defendant Coats made no showing of a property right in either the vessel searched or in the property seized.[3] He did not testify at the suppression hearing, even though he might have done so without prejudice to his rights at trial, but relied entirely on the testimony of Breslin, the captain of the vessel, to sustain his claim to privacy.[4]

Breslin stated, during his testimony, that his initial contacts were with the defendant and that it was the defendant who advanced funds for provisioning and equipping the vessel turned over to him for use in the illegal transportation of marijuana from Colombia to the United States. But the defendant represented to Breslin that he was acting under the orders of the top "boss." The defendant introduced Breslin immediately after this statement to a "Sam." Breslin assumed that "Sam" was the top boss, to whom the defendant had referred. Such assumption seemed to be borne out by later circumstances. Accordingly, from the time that "Sam" was introduced to Breslin by the defendant "Sam" became the controlling, dominant figure in the undertaking. Breslin operated completely from that time on under "Sam's" direction and control. It was "Sam" who directed Breslin where to take the vessel, instructed him by whom he would be met in Colombia when he arrived at the designated point in Colombia, and what he should do when he got there. It was "Sam" who made all the arrangements with the local Colombians for the delivery to the vessel of the cargo of marijuana. It was

[2] *See, United States* v. *Hunt* (5th Cir. 1974) 505 F.2d 931, 937, *cert. denied,* 421 U.S. 975 (1975).

[3] *See, United States* v. *Williams* (9th Cir. 1976) 536 F.2d 810, 813, *cert. denied,* 429 U.S. 839.

[4] *See, United States* v. *Williams,* 536 F.2d at 813.

"Sam" who paid for the cargo when it was delivered. When the cargo was finally taken aboard the vessel, it was "Sam" who, using maps and charts, marked out for Breslin the exact course the vessel was to take on its voyage to its proposed destination in coastal North Carolina, and it was he who provided directions to be followed in the event Breslin encountered any problems on the voyage. Thus, when Breslin ultimately embarked on the voyage, he was operating entirely under the control and direction of "Sam" in arranging to pick up and transport a cargo of marijuana purchased and paid for by "Sam." Breslin's evidence thus indicates that "Sam" was the real operator, the one entitled to the possession and control, of the vessel and that the defendant Coats was simply his agent in earlier contacting and dealing with Breslin.

There was accordingly strong and compelling evidence in the record that "Sam" was, as the defendant himself suggested to Breslin, the head man in the illegal undertaking who directed the activities of both the defendant and Breslin and under whose control Breslin was operating the vessel at the time it was seized. It was a reasonable deduction from these undisputed facts that the defendant was merely a subordinate of "Sam," charged with locating a vessel and crew for use by "Sam" in carrying out the illegal undertaking, and that the right of possession and control of the vessel, particularly after it began its voyage to Colombia, was in "Sam" and not the defendant. And this was the district court's finding of fact on which it based its denial of a right to an expectation of privacy on the part of the defendant in either the vessel or its contents. Since such finding was not clearly erroneous, it is binding on us in this appeal.[5]

The defendant also challenges the jury selection plan for the eastern district of North Carolina as failing to comply

[5] 3 Wright, Federal Practice and Procedure, § 678 at page 143; *United States* v. *Jobin* (1st Cir. 1976) 535 F.2d 154, 156; *United States* v. *Gunn* (5th Cir. 1970) 428 F.2d 1057, 1060.

with the National Jury Selection and Service Act of 1968, 28 U.S.C. §§ 1861-1875, and as violating the Fifth and Sixth Amendments. The particular plan at issue here utilizes lists of actual voters for jury selection. The defendant contends that use of this list resulted in an exclusion of 60% of the eligible jury population in the district, and that an alternative source of names should have been used.

The only showing here is that persons who failed to vote in the 1976 general election were excluded from consideration for jury duty. Absent a demonstration that some cognizable group has thereby been systematically excluded or substantially under-represented, this type of exclusion does not violate constitutional principles.[6] Nor does it fail, as defendant suggests, to comply with the policies and directives of the Act. As defendant's own figures demonstrate, use of voter registration lists rather than actual voter lists would increase the source from 40% of those eligible to 64%, thus still excluding 36%. Yet both types of lists are expressly approved by the Act. 28 U.S.C. § 1863(b)(2). Nor is any supplementation of names by use of alternative lists required absent a showing that voter lists do not represent a fair cross-section of the community.[7] With no demonstration of underrepresentation or systematic exclusion of any cognizable group, that showing has not been made here.

We have given careful consideration to defendant's other grounds of appeal and find no errors therein. Accordingly, the judgment of conviction is *AFFIRMED*.

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[6] *Castaneda* v. *Partida* (1977) 430 U.S. 482, 493-94; *Brown* v. *Allen* (1953) 344 U.S. 443, 470-74 (opinion of Mr. Justice Reed, announcing judgment).

[7] *United States* v. *Test* (10th Cir. 1976) 550 F.2d 577, 584, 586 n. 8 (en banc); *United States* v. *Brady* (9th Cir. 1978) 579 F.2d 1121, 1131, *cert. denied*, —— U.S. ——, 99 S. Ct. 849; *United States* v. *Ross* (9th Cir. 1972) 468 F.2d 1213, 1216, *cert. denied*, 410 U.S. 989 (1973).

EXHIBIT B

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 79-5015

UNITED STATES OF AMERICA, *Appellee*,

versus

GILLIAM RAYMOND COATS, a/k/a JACK LONG, a/k/a BILL WALTERS, *Appellant*.

ORDER

Upon consideration of the appellant's petition for rehearing and suggestion for rehearing en banc, by counsel, and no judge having requested a poll on the suggestion for rehearing en banc,

It is ADJUDGED AND ORDERED that the petition for rehearing is denied.

Entered at the direction of Judge Russell for a panel consisting of Judge Russell, Judge Field and Judge Widener.

For the Court,

/s/ WILLIAM K. SLATE, II
Clerk

EXHIBIT C

MEMORANDUM AND RECOMMENDATIONS ON PRETRIAL MOTIONS

This action was before the court upon various pretrial motions made by the defendant Gilliam Raymond Coats. Responses and briefs have been filed by counsel for both parties, and oral argument was heard at New Bern on September 18 and 19, 1978.

MOTION TO SUPPRESS EVIDENCE AND TO EXCLUDE TESTIMONY OF PAUL JEROME BRESLIN

In this motion the defendant asserts that the United States Coast Guard Cutter Alert made a warrantless and otherwise illegal boarding, search, and seizure of the vessel Lady Ellen and its cargo of marihuana in Mona Pass in the Caribbean sea on the evening of January 26, 1978, and that all evidence and statements obtained as a result thereof should be suppressed because in violation of the defendant's Fourth Amendment right to be free from unreasonable searches and seizures.

At the outset the defendant must establish his standing to challenge the seizures and searches attacked by his motion. It must be noted here that the same searches and seizures at issue here were the subject of identical motions made by the other defendants in this case which were argued and determined following a hearing at Raleigh in May, 1978. The decisions of this court on those motions were filed June 16 and June 20. The court determined that the only defendants involved in those motions who had standing to challenge the search and seizure of the Lady Ellen and the marihuana were defendants Harper and Rowe, who were present on board the Lady Ellen and in custody of the vessel and its cargo of marihuana. The court found that the only defendants who had standing to contest the searches and seizures made at Back Creek were:

(1) those defendants who were legitimately on the premises and in the house; (2) those who specifically alleged a proprietary or possessory interest in the premises or in any article seized; (3) those who were victims of any search, or, (4) those against whom a search was directed. In addition, the defendants who were present on board the Lady Ellen when it was again seized in the inland waters off Back Creek were determined to have standing to assert a Fourth Amendment right.

Defendant Coats at this time has not offered any evidence or asserted any claim which would confer standing upon him of the same nature as those defendants who established standing in the earlier hearing. The only evidence defendant Coats presented at this hearing to establish standing was by calling as a witness Paul Jerome Breslin, master of the Lady Ellen and the informant who cooperated with the government in making the controlled delivery of the marihuana at Back Creek, and by introducing into evidence several written statements given by Breslin to government officers on board the cutter Alert. Breslin answered an advertisement in a boating magazine concerning a boat for sale, which led him to a meeting with defendant Coats in Morehead City at which time Breslin said he purchased the boat from Coats. As a result of that meeting Coats later telephoned Breslin several times at his home in Titusville, Florida urging him to accept Coats' offer to take a boat a Columbia and bring back some marihuana to the U.S. Coats offered Breslin a large sum of money for Breslin to command the boat which was to be obtained as soon as possible. At Coats' direction Breslin engaged defendants Harper and Rowe to act as crew when a boat was obtained. Breslin testified that Coats told him that he would obtain a fishing type vessel suitable for the operation and Coats later took Breslin to the Thompson dock at Bayou LaBatre, Alabama and showed him the vessel Lady Ellen. Coats advanced $4,000.00 each to Breslin, Harper, and Rowe. Breslin said he also received $2,000.00

from "Sam," who is defendant Govus. Breslin saw Coats pay for the fuel for the vessel, and Coats also paid for the provisions. Coats directed Breslin in all of their movements in the days preceding the voyage. He delivered four heavy suitcases to the Lady Ellen and placed them in hiding, saying they were full of one hundred dollar bills. Coats told Breslin he would pay him after the marihuana was imported. Breslin's statement, given on the Alert, said he was offered a hundred thousand dollars, but Breslin testified that it was actually one hundred and fifty thousand dollars. Coats gave Breslin explicit instructions for keeping in radio contact during the voyage, and furnished code words to use in sending and receiving instructions from land such as where to rendezvous for unloading. Coats told Breslin the how, where, and when Breslin would be paid. On cross-examination by counsel for the government, Breslin could not say that he knew who owned the Lady Ellen or the marihuana. Coats did testify that from his experience with Coats and "Sam" (Govus) that Govus was the "overboss," and Coats was over the boat and crew. Breslin said that Coats told him that he (Coats) was an employee.[1] D.E.A. agent Edward R. Hinchman testified to the effect that the information he had received from other officers was that defendant Coats had a controlling interest in the Lady Ellen and the marihuana. A similar evidentiary issue was presented and discussed in the decisions on the motions at the previous hearing, and the court concluded that hearsay evidence of that kind is not competent to prove the substantive fact of proprietary or possessory interest, and therefore this evidence does not support the defendant's claim of standing by itself.

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[1] Coats further told Breslin that an employee of the organization could not have a financial interest in the cargo of marihuana. Breslin's other testimony of Coats' obtaining the boat, paying the expenses, and giving orders for its operation could permit as likely an inference that he was an agent, as that he was an owner.

The next contention in the defendant's motion to suppress and exclude evidence is directed toward the search and seizure of evidence at Back Creek, and on that question the only evidence introduced by the government was the transcript of testimony given by Drug Enforcement Administration agent Hinchman at the May hearing in this same action, after which government counsel tendered the witness to counsel for the defendant for cross-examination. On this aspect of the case, the first question to be decided is whether the defendant has standing to challenge any searches and seizures at Back Creek. D.E.A. agent Hinchman at this hearing did not present any testimony different from or in addition to his testimony at the earlier hearing, except the hearsay testimony referred to above. Government counsel stated that the only evidence seized at Back Creek which it might offer against defendant at the trial was a notebook, government exhibit 29 from the previous hearing, which was again identified by Hinchman and introduced into evidence of the hearing. Hinchman said that he did not know who was the owner of the notebook or prepared it, but it was found in a briefcase in the left front bedroom in the house searched on February 5, 1978. There was no evidence that Coats had any interest in the notebook or any other property in the house, and he asserted no possessory or proprietary interest in any other property on the premises or at the dock. His only relevant contention is that of a controlling, or proprietary, or possessory interest in the Lady Ellen and the marihuana based upon the hearsay testimony already discussed. Therefore, based upon all of the evidence presented, the court finds that the defendant Coats did not establish standing to challenge the searches and seizures at Back Creek or on the Lady Ellen. That precludes the necessity of making specific findings as to the validity of those searches and seizures, but the court does find from the evidence at this hearing that the seizures and searches were valid, just as the court found based upon the evidence at the earlier hearing.

The reasoning and authorities relied upon by the court in reaching that decision are set forth at length in the court's opinions filed in June in this action. Defendant argues in his brief that the authorities referred to therein support his claim of standing, but the court is satisfied that the decisions relied upon in its previous opinion on this question are the controlling decisions.

Accordingly, the court finds that the defendant does not have standing and that irrespective of the standing question, all of the searches and seizures and the boarding of the Lady Ellen and the search and seizure of evidence thereon were entirely valid. I recommend that the defendant's motion to suppress evidence and exclude Breslin's testimony be denied.

MOTION TO DISMISS INDICTMENT CAUSED BY PREINDICTMENT DELAY

The defendant bases his motion on the grounds that the government possessed enough information about Gilliam Raymond Coats and his involvement in this offense on January 28, 1978 when Breslin gave government agents a statement setting forth Coats' actions, statements and meetings in planning the operation, and that this information in the possession of the government was sufficient to establish probable cause to present a bill of indictment to the grand jury on February 13, 1978 when the fourteen other defendants in the case were indicted. Coats was named as an unindicted coconspirator in that indictment. Coats asserts that the government waited six months from the time it received the information from Breslin before indicting him, and five months from the time of the indictment of the other defendants, and defendant alleges in his motion that the sole purpose of the delay in indicting him was an intentional device by the government to gain tactical advantage over the defendant or to harass him. Defendant asserts that he has been prejudiced by this delay be-

cause witnesses he may present in his defense may have difficulty in recalling and remembering specific days when defendant was in their presence. Defendant asserts that there is no satisfactory or justifiable reason for the government's failure to indict him at the same time as the others.

The government's response to the motion recognizes that delays in indicting a defendant can violate his due process rights if the delays are caused by the government for the purpose of gaining a tactical advantage and the delays result in actual prejudice to the defendant. The court notes that the cases cited by the defendant in its response are correct in stating that both deliberate and substantial prejudice must be shown in order to establish a violation of due process. At this hearing the defendant did not present any evidence that the delay in his indictment was caused by the government with the intention of gaining any tactical advantage or with the intention to harass the defendant, or that in fact the defendant suffered any prejudice whatsoever, other than the conclusional argument referred to above.

Government counsel also stated at the hearing that contrary to defendant's contention that the delay was intentional and for purpose of advantage, a later and separate trial for this defendant actually imposes an increased burden, time, effort and expense which would be avoided by a joint trial with the other defendants. There would be no rational reason for the government to delay this indictment for other than the proper purpose of obtaining sufficient reliable evidence to present to the grand jury. Government counsel stated that it would be improper and unwise to present a bill of indictment to the grand jury based upon Breslin's statement alone until the government was able to obtain corroborating evidence to support Breslin's statement to justify an indictment. The only evidence in the hearing relating to a reason for the delay was Bres-

lin's testimony that the Assistant United States Attorney told him that he would not indict Coats upon Breslin's statement alone, and that this statement was made to Breslin within two days prior to his testifying at the hearing. Consistent with that testimony was the Assistant United Staates Attorney's statement to the court that he had wanted to obtain corroborating evidence to substantiate Breslin's statements about Coats before submitting an indictment to the grand jury.

Based upon that evidence, the court is convinced that the delay in indicting Coats was not for any motive or intention on the part of the government to gain an advantage or to harass Coats. The court is inclined to believe, that, for reasons of sound judgment and based on common sense and practical experience, the indictment was deferred until sufficient corroborating evidence could be obtained. The court finds that there is no merit to the defendant's claim regarding delay or any lack of good faith on the part of the government, and I conclude that the motion should be denied, and so recommend.

MOTION TO STRIKE AND SUPPRESS USE OF ALIASES

The defendant shows that the indictment charges defendant Coats with using the aliases Jack Long and Bill Walters, and asserts that any evidence concerning the use of such aliases was obtained as a result of illegal searches and seizures and should therefore be stricken from the indictment and suppressed at the trial as being tainted by the illegality of the foregoing. Defendant further argues that the use of such aliases is inherently prejudicial and a violation of defendant's due process right to a fair trial.

The government responded that the information as to the use of these aliases came from Breslin in his statements to the government that they were used in the course of the alleged conspiracy. In the earlier hearing upon the corresponding motion by other defendants, this court decided

that the government's use of aliases in the indictment was based upon reliable information that they had been used by the defendants and that the use of aliases in the indictment does not deny a defendant any due process rights to a fair trial. That decision is valid in this case. Breslin's testimony in this hearing supports a finding that the use of the aliases in this indictment was justified and proper. The court finds that the use of aliases in the indictment here does not deny defendant a fair trial, and recommends that the motion be denied.

Summarizing, the court recommends that all of the foregoing motions by the defendant Coats should be denied.

This 22nd day of September, 1978.

/s/ Logan D. Howell,
Logan D. Howell
United States Magistrate

EXHIBIT C

ORDER

This case is presently before the courts on defendant's exceptions to the memorandum and recommendations filed by the Honorable Logan D. Howell, United States Magistrate, on September 22, 1978 with respect to motions to suppress evidence and to exclude testimony of the witness Breslin, to dismiss the indictment on grounds of pre-indictment delay and to strike and suppress the use by the government of aliases by the defendant. The court's familiarity with the case dates from May, 1978 when similar motions were filed by other defendants in the case relating to the search and seizure of the vessel, Lady Ellen. The motions of those defendants were found by the Magistrate to be non-meritorious, and this court after a careful review of the record concluded that the Magistrate's recommendations were proper and denied the motions.

The defendant here has advanced no new reasons in support of his motion to suppress, and the court has again concluded that the Magistrate's recommendation that the motion be denied for lack of standing on the part of the defendant is proper and that the motion should be and is hereby denied.

The Magistrate's conclusion that the government's delay in indicting this defendant was not for any motive or intention on the part of the government to gain an advantage or to harass him is supported by substantial evidence, and indeed there is no appreciable evidence to the contrary. The Magistrate's findings and conclusions are therefore adopted by the court and defendant's motion to dismiss for pre-indictment delay is denied.

Defendant's motion to strike and suppress use of aliases was found by the Magistrate to be without merit, and this court's review of the record has led it a similar conclusion.

The court therefore adopts the Magistrate's findings and recommendations and defendant's motion to strike and suppress the use of aliases is also denied.

/s/ F. T. DUPREE, JR.
F. T. Dupree, Jr.
United States District Judge

October 2, 1978.

EXHIBIT D

MAGISTRATE'S RECOMMENDATIONS

This matter having been assigned to the undersigned by The Honorable F. T. Dupree, Jr., United States District Judge, to take evidence upon the defendant's motion challenging the jury selection plan of the United States District Court for the Eastern District of North Carolina, and for the Magistrate to make a memorandum of recommendations herein.

That hearing was conducted in the United States Courthouse in New Bern, North Carolina, on the 28th day of September 1978 in which the defendant, Gilliam Raymond Coats was represented by L. Patten Mason, Esquire, and the United States of America was represented by Herman E. Gaskins, Jr., Assistant United States Attorney, and after the taking and hearing of testimony and presentation of evidence and considering legal memoranda of counsel, the Magistrate makes the following recommendations as to findings of fact:

PROPOSED FINDINGS OF FACT

1. That the defendant is charged by grand jury indictment filed July 17, 1978, with conspiracy to import marijuana in violation of Title 21, U.S.C., Sections 952(a) and 960(a)(1).

2. That by motion filed on August 7, 1978, and supplemental motion filed September 20, 1978, the defendant challenged the selection process of grand and petit juries in the Eastern District of North Carolina.

3. That the Plan for random jury selection of the Eastern District and modifications thereto provide that the names of prospective jurors shall be publicly selected at random from the lists of all persons actually voting in the last General Election held in the political subdivisions of

the counties within the respective divisions in which votes were cast for the President and Vice President of the United States. The Plan prescribes that alternate sources in addition to the voter lists may be used to determine the names of prospective jurors. The Plan authorizes the Clerk of Court to manage the jury selection process. The present master jury wheel in use in the Eastern District was randomly filled from the lists of actual voters listed on the records of the counties within each division of the Eastern District. No other source or sources of names were used. In the 1976 General Election of the President and Vice President of the United States there were 544,444 actual voters in the Eastern District.

4. That the defendant offered expert testimony based upon random sample from information obtained from the prospective jurors questionnaire as to jury representation analysis based upon categorization of race, occupation, age, and other factors in comparison of the same categories as applicable to the 1970 census data for the various divisions of the Eastern District. Based upon the 1970 census data, the defendant's expert testimony purported to show some under-representation of the following categories: Blacks, blue collar workers, uneducated, and persons between the ages of 18 and 34.

5. Although while evidence was offered as to the statistical confidence range and reliability of the computations based upon this data, the reliability and credibility of the statistical sources of information could not be shown.

PROPOSED CONCLUSIONS OF LAW

1. The Random Jury Plan and its implementation in the Eastern District conforms with the National Jury and Selection Act of 1968 (28 USC 1861 *et seq.*)

2. The defendant has failed to show that there has been a substantial failure to comply with the provisions of the

Jury Selection and Service Act in selecting the Grand and Petit juries in the Eastern District of North Carolina.

Now, Therefore, in accordance with the foregoing proposed findings of fact and proposed conclusions of law, it is the Magistrate's recommendation that the Court enter the following:

PROPOSED ORDER

It is hereby Ordered, Adjudged, and Decreed, that the defendant's motion challening the Jury Selection Plan of the United States District Court for the Eastern District of North Carolina and the relief prayed for therein be and the same are hereby denied.

It is Further Ordered that the Clerk of this Court serve a copy of this order on all counsel of record.

These recommendations respectively submitted this 28th day of September, 1978, at 8:30 o'clock P.M.

/s/ Charles K. McCotter, Jr.
Charles K. McCotter, Jr.
United States Magistrate

EXHIBIT D

ORDER

This case is now before the court on defendant's motion challenging the jury selection plan of this court. Defendant's motion to dismiss the indictment or to stay further proceedings on the ground that the jury selection plan of the district does not comply with the Constitution and with the provisions of 28 U.S.C. § 1861, *et seq.*, has been heard by United States Magistrate Charles K. McCotter, Jr., who filed his proposed findings of fact and recommendations that the defendant's motion be denied on September 28, 1978.

Defendant's motion is based on the same grounds as have been advanced in support of similar motions presented to the court in other cases in prior years. In those cases the court has found the jury selection plan of the district to be inconformity with law, and appeals from this court's rulings to the Fourth Circuit have not heretofore been successful. The plan itself, of course, was required by law to be approved by the Judicial Council of the Fourth Circuit, and it has always had that approval.

While it is certainly true that the plan results in actual operation to underrepresentation of certain elements of the citizenry who would otherwise be eligible for jury service, this results not from any systematic exclusion of such elements but rather from the failure of substantial numbers of persons in those elements to go to the polls and vote on election day. Since the law recognizes voter lists as a proper source of names to be drawn for jury service, and since the plan lawfully uses the voter lists as the source for obtaining jurors, the court is of opinion that the Magistrate's proposed findings of fact and conclusions are proper and should be adopted by the court. Accordingly, it is now

ORDERED that defendant's motion to dismiss the indictment on the ground that the jury selection plan in this district violates the Constitution and statutes of the United States be and the same is hereby denied.

/s/ F. T. DUPREE, JR.
F. T. Dupree, Jr.
United States District Judge

October 2, 1978.

EXHIBIT E

14 U.S.C. 89(a)

"The Coast Guard may make inquiries, examinations, inspections, searches, seizures, and arrests upon the high seas and waters over which the United States has jurisdiction, for the prevention, detection, and suppression of violations of laws of the United States. For such purposes, commissioned, warrant and petty officers may at any time go on board of any vessel subject to the jurisdiction, or to the operation of any law, of the United States, address inquiries to those on board, examine the ship's documents and papers, and examine, inspect, and search the vessel and use all necessary force to compel compliance. When from such inquiries, examination, inspection, or search it appears that a breach of the laws of the United States rendering a person liable to arrest is being, or has been committed, by any person, such person shall be arrested or, if escaping to shore, shall be immediately pursued and arrested on shore, or other lawful and appropriate action shall be taken; or, if it shall appear that a breach of the laws of the United States has been committed so as to render such vessel, or the merchandise, or any part thereof, on board of, or brought into the United States by, such vessel, liable to forfeiture, or so as to render such vessel liable to a fine or penalty and if necessary to secure such fine or penalty, such vessel or such merchandise, or both, shall be seized."

EXHIBIT F

28 U.S.C. § 1861. Declaration of policy

It is the policy of the United States that all litigants in Federal courts entitled to trial by jury shall have the right to grand and petit juries selected at random from a fair cross section of the community in the district or division wherein the court convenes. It is further the policy of the United States that all citizens shall have the opportunity to be considered for service on grand and petit juries in the district courts of the United States, and shall have an obligation to serve as jurors when summoned for that purpose.

§ 1862. Discrimination prohibited

No citizen shall be excluded from service as a grand or petit juror in the district courts of the United States on account of race, color, religion, sex, national origin, or economic status.

§ 1863. Plan for random jury selection

(a) Each United States district court shall devise and place into operation a written plan for random selection of grand and petit jurors that shall be designed to achieve the objectives of sections 1861 and 1862 of this title [28 USCS §§ 1861, 1862], and that shall otherwise comply with the provisions of this title. The plan shall be placed into operation after approval by a reviewing panel consisting of the members of the judicial council of the circuit and either the chief judge of the district whose plan is being reviewed or such other active district judge of that district as the chief judge of the district may designate. The panel shall examine the plan to ascertain that it complies with the provisions of this title. If the reviewing panel finds that the plan does not comply, the panel shall state the particulars in which the plan fails to comply and direct the district court to present within a reasonable time an alternative plan remedying the defect or defects. Separate plans may be adopted for each division or combination of divisions within a judicial district. The district court may modify a plan at any time and it shall modify the plan when so directed by the reviewing panel. The district court shall promptly notify the panel, the Administrative Office of the United States Courts, and the Attorney General of the United States, of the initial adoption and future modifications of the plan by filing copies therewith. Modifications of the plan made at the instance of the district court shall become effective after approval by the panel. Each district court shall submit a report on the jury selection process within its jurisdiction to the Administrative Office of the United States Courts in such form and at such times as the Judicial Conference of the United States may specify. The Judicial Conference of the United States may, from time to time, adopt rules and regulations governing the provisions and the operation of the plans formulated under this title.

(b) Among other things, such plan shall—

(1) either establish a jury commission, or authorize the clerk of the court, to manage the jury selection process. If the plan establishes a jury commission, the district court shall appoint one citizen to serve with the clerk of the court as the jury commission: Provided, however, That the plan for the District of Columbia may establish a jury commission consisting of three citizens. The citizen jury commissioner shall not belong to the same political party as the clerk serving with him. The clerk or the jury commission, as the case may be, shall act under the supervision and control of the chief judge of the district court or such other judge of the district court as the plan may provide. Each jury commissioner shall, during his tenure in office, reside in the judicial district or division for which he is appointed. Each citizen jury com-

missioner shall receive compensation to be fixed by the district court plan at a rate not to exceed $50 per day for each day necessarily employed in the performance of his duties, plus reimbursement for travel, subsistence, and other necessary expenses incurred by him in the performance of such duties. The Judicial Conference of the United States may establish standards for allowance of travel, subsistence, and other necessary expenses incurred by jury commissioners.

(2) specify whether the names of prospective jurors shall be selected from the voter registration lists or the lists of actual voters of the political subdivisions within the district or division. The plan shall prescribe some other source or sources of names in addition to voter lists where necessary to foster the policy and protect the rights secured by sections 1861 and 1862 of this tile [28 USCS §§ 1861, 1862]. The plan for the District of Columbia may require the names of prospective jurors to be selected from the city directory rather than from voter lists. The plans for the districts of Puerto Rico and the Canal Zone may prescribe some other source or sources of names of prospective jurors in lieu of voter lists, the use of which shall be consistent with the policies declared and rights secured by sections 1861 and 1862 of this tile [28 USCS §§ 1861, 1862].

(3) specify detailed procedures to be followed by the jury commission or clerk in selecting names from the sources specified in paragraph (2) of this subsection. These procedures shall be designed to ensure the random selection of a fair cross section of the persons residing in the community in the district or division wherein the court convenes. They shall ensure that names of persons residing in each of the counties, parishes, or similar political subdivisions within the judicial district or division are placed in a master jury

wheel; and shall ensure that each county, parish, or similar political subdivision within the district or division is substantially proportionally represented in the master jury wheel for that judicial district, division, or combination of divisions. For the purposes of determining proportional representation in the master jury wheel, either the number of actual voters at the last general election in each county, parish, or similar political subdivision, or the number of registered voters if registration of voters is uniformly required throughout the district or division, may be used.

(4) provide for a master jury wheel (or a device similar in purpose and function) into which the names of those randomly selected shall be placed. The plan shall fix a minimum number of names to be placed initially in the master jury wheel, which shall be at least one-half of 1 per centum of the total number of persons on the lists used as a source of names for the district or division; but if this number of names is believed to be cumbersome and unnecessary, the plan may fix a smaller number of names to be placed in the master wheel, but in no event less than one thousand. The chief judge of the district court, or such other district court judge as the plan may provide, may order additional names to be placed in the master jury wheel from time to time as necessary. The plan shall provide for periodic emptying and refilling of the master jury wheel at specified times, the interval for which shall not exceed four years.

(5) specify those groups of persons or occupational classes whose members shall, on individual request therefor, be excused from jury service. Such groups or classes shall be excused only if the district court finds, and the plan states, that jury service by such class or group would entail undue hardship or extreme inconvenience to the members thereof, and excuse of mem-

bers thereof would not be inconsistent with sections 1861 and 1862 of this title [28 USCS §§ 1861, 1862].

(6) specify those groups of persons or occupational classes whose members shall be barred from jury service on the ground that they are exempt. Such groups or classes shall be exempt only if the district court finds, and the plan states, that their exemption is in the public interest and would not be inconsistent with sections 1861 and 1862 of this title [28 USCS §§ 1861, 1862]. The plan shall provide for exemption of the following persons: (i) members in active service in the Armed Forces of the United States; (ii) members of the fire or police departments of any State, district, territory, possession, or subdivision thereof; (iii) public officers in the executive, legislative, or judicial branches of the Government of the United States, or any State, district, territory, or possession or subdivision thereof, who are actively engaged in the performance of official duties.

(7) fix the time when the names drawn from the qualified jury wheel shall be disclosed to parties and to the public. If the plan permits these names to be made public, it may nevertheless permit the chief judge of the district court, or such other district court judge as the plan may provide, to keep these names confidential in any case where the interests of justice so require.

(8) specify the procedures to be followed by the clerk or jury commission in assigning persons whose names have been drawn from the qualified jury wheel to grand and petit jury panels.

(c) The initial plan shall be devised by each district court and transmitted to the reviewing panel specified in subsection (a) of this section within one hundred and twenty days of the date of enactment of the Jury Selection and

Service Act of 1968 [Mar. 27, 1968]. The panel shall approve or direct the modification of each plan so submitted within sixty days thereafter. Each plan or modification made at the direction of the panel shall become effective after approval at such time thereafter as the panel directs, in no event to exceed ninety days from the date of approval. Modifications made at the instance of the district court under subsection (a) of this section shall be effective at such time thereafter as the panel directs, in no event to exceed ninety days from the date of modification.

(d) State, local, and Federal officials having custody, possession, or control of voter registration lists, lists of actual voters, or other appropriate records shall make such lists and records available to the jury commission or clerks for inspection, reproduction, and copying at all reasonable times as the commission or clerk may deem necessary and proper for the performance of duties under this title. The district courts shall have jurisdiction upon application by the Attorney General of the United States to compel compliance with this subsection by appropriate process.

§ 1867. Challenging compliance with selection procedures

(a) In criminal cases, before the voir dire examination begins, or within seven days after the defendant discovered or could have discovered, by the exercise of diligence, the grounds therefor, whichever is earlier, the defendant may move to dismiss the indictment or stay the proceedings against him on the ground of substantial failure to comply with the provisions of this title in selecting the grand or petit jury.

(b) In criminal cases, before the voir dire examination begins, or within seven days after the Attorney General of the United States discovered or could have discovered, by the exercise of diligence, the grounds therefor, which-

ever is earlier, the Attorney General may move to dismiss the indictment or stay the proceedings on the ground of substantial failure to comply with the provisions of this title in selecting the grand or petit jury.

(c) In civil cases, before the voir dire examination begins, or within seven days after the party discovered or could have discovered, by the exercise of diligence, the grounds therefor, whichever is earlier, any party may move to stay the proceedings on the ground of substantial failure to comply with the provisions of this title in selecting the petit jury.

(d) Upon motion filed under subsection (a), (b), or (c) of this section, containing a sworn statement of facts which, if true, would constitute a substantial failure to comply with the provisions of this title, the moving party shall be entitled to present in support of such motion the testimony of the jury commission or clerk, if available, any relevant records and papers not public or otherwise available by the jury commissioner or clerk, and any other relevant evidence. If the court determines that there has been a substantial failure to comply with the provisions of this title in selecting the grand jury, the court shall stay the proceedings pending the selection of a grand jury in conformity with this title or dismiss the indictment, whichever is appropriate. If the court determines that there has been a substantial failure to comply with the provisions of this title in selecting the petit jury, the court shall stay the proceedings pending the selection of a petit jury in conformity with this title [28 USCS § 1867].

(e) The procedures prescribed by this section shall be the exclusive means by which a person accused of a Federal crime, the Attorney General of the United States or a party in a civil case may challenge any jury on the ground that such jury was not selected in conformity with the provisions of this title. Nothing in this section shall preclude any person or the United States from pursuing any

other remedy, civil or criminal, which may be available for the vindication or enforcement of any law prohibiting discrimination on account of race, color, religion, sex, national origin or economic status in the selection of persons for service on grand or petit juries.

(f) The contents of records or papers used by the jury commission or clerk in connection with the jury selection process shall not be disclosed, except pursuant to the district court plan or as may be necessary in the preparation or presentation of a motion under subsection (a), (b), or (c) of this section, until after the master jury wheel has been emptied and refilled pursuant to section 1863(b)(4) of this title [28 USCS § 1863(b)], and all persons selected to serve as jurors before the master wheel was emptied have completed such service. The parties in a case shall be allowed to inspect, reproduce, and copy such records or papers at all reasonable times during the preparation and pendency of such a motion. Any person who discloses the contents of any record or paper in violation of this subsection may be fined not more than $1,000 or imprisoned not more than one year, or both.

Supreme Court, U. S.
FILED
APR 3 1980

No. 79-1230

In the Supreme Court of the United States

OCTOBER TERM, 1979

GILLIAM RAYMOND COATS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-6a) is reported at 611 F.2d 37.

JURISDICTION

The judgment of the court of appeals was entered on November 29, 1979. A petition for rehearing was denied on January 10, 1980 (Pet. App. 7a). The petition for a writ of certiorari was filed on February

8, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether, in the circumstances of this case, the boarding of an American vessel on the high seas by Coast Guard officers to conduct a safety and documentation check violated petitioner's rights under the Fourth Amendment.

2. Whether the jury selection plan of the United States District Court for the Eastern District of North Carolina deprived petitioner of a jury drawn from a fair cross section of the community, in violation of the Jury Selection and Service Act of 1968 or the Constitution.

3. Whether the in-court identification of petitioner by a government witness was the product of an impermissibly suggestive pretrial confrontation.

4. Whether a motel registration card was improperly admitted into evidence at trial.

STATEMENT

After a jury trial in the United States District Court for the Eastern District of North Carolina, petitioner was convicted of conspiring to import marijuana, in violation of 21 U.S.C. 963. He was sentenced to five years' imprisonment, to be followed by a five-year special parole term,[1] and fined $15,000. The court of appeals affirmed (Pet. App. 1a-6a).

[1] Petitioner does not contest the propriety of imposing a special parole term as part of his sentence for the narcotics conspiracy. That issue is presently before the Court in *Bifulco* v. *United States*, No. 79-5010, argued Feb. 27, 1980. However, there is no need for the Court to defer consideration of this petition until *Bifulco* is decided. If the Court in *Bifulco* concludes that a special parole term may not be imposed in a case such as this, petitioner may move the district court for correction of his sentence under Rule 35, Fed. R. Crim. P.

The evidence showed that in July 1977, petitioner, acting on behalf of David Govus, alias "Sam" (A. 662, 894-895),[2] hired Paul Breslin to pilot a boat to Colombia to pick up a cargo of marijuana (A. 602-605, 889-893). On January 2, 1978, petitioner telephoned Breslin and instructed him to be in Mobile, Alabama, on January 4. Breslin and his two-man crew arrived in Mobile as instructed. Petitioner, using the name "Jack Long" (A. 644), advised them that he had found a boat (A. 898-899).

On the following day, petitioner accompanied Breslin and his crew to Bayou LaBatre, Alabama, where they inspected the shrimp trawler LADY ELLEN (A. 902-903). During the next several days, Breslin and his crew made repairs to the vessel and obtained provisions for the trip with money provided by petitioner (A. 905-907).

On January 8, 1978, Govus arrived in Mobile with a conveyor belt that was loaded onto the LADY ELLEN (A. 908-909). The following day, Govus met with petitioner and Breslin and gave detailed instructions for the voyage to Colombia (A. 911-913). Subsequently, Govus placed two large suitcases containing one-hundred dollar bills aboard the LADY ELLEN

[2] "A." refers to the joint appendix in the court of appeals.

(A. 913). The vessel departed on January 10—with only Breslin and his two-man crew on board—and arrived eight days later off the coast of Colombia. Govus met the boat in a cove, where it was loaded with bales of marijuana. The vessel then began its return trip to the United States (A. 913-921).

On January 25, 1978, the LADY ELLEN was spotted by the United States Coast Guard Cutter ALERT in the Mona Passage between the Dominican Republic and Puerto Rico (A. 339-341). Following its policy of stopping all United States vessels passing through the channel that were less than 250 feet in length (A. 469-470), the crew of the ALERT boarded the LADY ELLEN for purposes of making a safety and documentation inspection (A. 343-345). Immediately upon boarding, they were informed by Breslin that he was sailing from Colombia and was loaded with marijuana (A. 345, 928). A search of the vessel uncovered approximately 25 tons of marijuana. The crew then cooperated in a controlled delivery of the marijuana to their co-conspirators in North Carolina (A. 925-944). Ultimately, the marijuana was seized, and a number of individuals, including petitioner, were arrested.

ARGUMENT

1. Relying on *Delaware* v. *Prouse*, 440 U.S. 648 (1979), petitioner contends (Pet. 7-9) that the suspicionless stopping and boarding of the LADY ELLEN by Coast Guard officers for the purpose of conducting a safety and documentation check violated his Fourth Amendment rights. This court recently declined to review a similar claim in *Erwin* v. *United States*, cert. denied, No. 79-579 (Feb. 19, 1980), and there is no greater reason to grant review here. Indeed, even assuming that the issue may warrant review in an appropriate case, this is not such a case because, as both courts below correctly concluded (Pet. App. 3a-5a, 9a-10a, 16a), the stop and search of the vessel did not infringe any Fourth Amendment rights of petitioner.

It is uncontested that petitioner was not aboard the LADY ELLEN when it was stopped by the Coast Guard. Nor does the evidence indicate that he had a possessory or proprietary interest in the vessel or its illegal cargo. On the contrary, the evidence showed that while petitioner located the vessel and made the initial offer to purchase it, he was not present when the boat was purchased by an individual named "Walter Poole" (A. 1329-1332, 1335, 1339). To be sure, Breslin testified that he was hired by petitioner and that petitioner advanced funds for provisioning and equipping the vessel. However, petitioner represented to Breslin that "Sam" was his "boss" in the operation (A. 894-895), that he (petitioner) was only an employee of the organization, and that as an employee he would have no financial interest in the cargo of marijuana (A. 661). Accordingly, from the time that "Sam" Govus was introduced to Breslin by petitioner, Govus became the controlling figure in the undertaking. It was Govus who directed Breslin where to take the vessel; instructed him what to do when he

reached Colombia; arranged for the delivery of the marijuana; paid for the marijuana; marked out the exact course the vessel was to take on its voyage to North Carolina; and provided directions to be followed in the event any problems arose. Thus, as both courts below correctly concluded (Pet. App. 4a-5a, 10a), petitioner was no more than Govus' agent in his dealings with Breslin.[3]

Since the evidence established that petitioner was not present and had no right of ownership nor actual control of either the vessel or the marijuana at the time of the stop, the actions of the Coast Guard officers in stopping and boarding the vessel could not have interfered with petitioner's legitimate expectations of privacy. See *Rakas* v. *Illinois*, 439 U.S. 128 (1978).[4] Accordingly, petitioner is not entitled to seek suppression of the marijuana discovered in the course of the boarding.[5]

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[3] Petitioner bases his claim of "standing" on his "responsibility * * * to oversee the boat and crew" before the vessel sailed (Pet. 10). Such a passing contact with the vessel hardly gives rise to a privacy interest which would allow petitioner to challenge a search of the boat several weeks later.

[4] For the same reasons, there is no need to defer disposition of this case pending this Court's decisions in *United States* v. *Salvucci*, No. 79-244, and *Rawlings* v. *Kentucky*, No. 79-5146, argued March 26, 1980.

[5] Even assuming that petitioner has standing to object to the stop, this case does not involve the sort of unconstrained exercise of discretion that was present in *Delaware* v. *Prouse*, *supra*, where police officers made random stops of motor vehicles for registration checks. In *Prouse*, the Court specifically noted that "[q]uestioning of all oncoming traffic at roadblock-type stops" is one method of avoiding the vice of unconstrained discretion. 440 U.S. at 663; *id.* at 663-664 (Blackmun, J., concurring). The stop of the LADY ELLEN was performed as part of a policy of stopping all American flag vessels under 250 feet in length that sailed through the Mona Passage. The stop here thus satisfied the standards established in *Prouse*. See also *United States* v. *Piner*, 608 F.2d 358, 361 (9th Cir. 1979). In a companion case involving several of petitioners' co-defendants who were found to have standing to contest the stop at issue here, the court of appeals upheld the stop in part on the ground that the decision to stop was not left to the discretion of the Coast Guard officers but was based on a uniform policy embodying a neutral standard. *United States* v. *Harper*, No. 79-5016 (4th Cir. Feb. 13, 1980).

2. Petitioner contends (Pet. 5-6, 11-13) that the jury selection plan of the United States District Court for the Eastern District of North Carolina deprived him of a jury drawn from a fair cross section of the community, in violation of the Jury Selection and Service Act of 1968, 28 U.S.C. 1861 et seq., and the Sixth Amendment. This claim is without merit.

The Jury Selection and Service Act requires that federal juries be "selected at random from a fair cross section of the community" (28 U.S.C. 1861) and provides that no citizen shall be excluded from jury service "on account of race, color, religion, sex, national origin, or economic status." 28 U.S.C. 1862. Lists of actual or registered voters are to be used as the basic source for juror selection, but the Act also provides that the district court may supplement the voter lists with names drawn from other sources "where necessary to foster the policy and protect the rights secured by sections 1861 and 1862." 28 U.S.C.

1863(b)(2). In accordance with the Act, the jury selection plan of the Eastern District of North Carolina provides that the names of prospective jurors are to be selected at random from lists of actual voters. Petitioner asserts, however, that the plan excludes from juries 62% of the district's residents who are eligible for jury duty but who did not vote in 1976, resulting in the underrepresentation of blacks, blue collar workers, persons without a college education, persons with an annual income under $7,000, and persons between the ages of 18 and 34. Hence, petitioner contends that he was denied his statutory and constitutional rights to a jury selected from a fair cross section of the community, and that to avoid these statutory and constitutional violations the district court should have supplemented the voter lists from other sources.

In order to be entitled to reversal for violation of the statutory fair-cross-section requirement, petitioner must show, at the very least, that a "cognizable" group within the community was substantially underrepresented on jury venires in the Raleigh Division of the Eastern District of North Carolina, where his case was tried. See *United States* v. *Brady*, 579 F.2d 1121, 1132-1133 (9th Cir. 1978), cert. denied, 439 U.S. 1074 (1979). To prevail on his constitutional claim, petitioner must establish, in addition to the foregoing factors, that the substantial underrepresentation of a cognizable group was due to the "systematic exclusion" of members of that group in the

jury selection process. See *Duren* v. *Missouri*, 439 U.S. 357, 364 (1979).[6]

Petitioner, we submit, has failed in this task. For purposes of fair-cross-section analysis, a "cognizable" group is one which, "in some objectively discernible and significant way, is distinct from the rest of society and whose interests cannot be adequately represented by other members of the * * * jury panel." *United States* v. *Potter*, 552 F.2d 901, 904 (9th Cir. 1977). The courts have held that the young and less educated are not cognizable groups for purposes of the Act. *Id.* at 905 (collecting cases); *United States* v. *Greene*, 489 F.2d 1145, 1149 (D.C. Cir. 1973), cert. denied, 419 U.S. 977 (1974). Similarly, "blue-collar workers" do not constitute a cognizable group, since they have diverse characteristics that defy classification.

While "economic status" is a cognizable factor under the statute (see 28 U.S.C. 1862), individual income alone does not define that status. A bachelor with an income of $6,999, for example, plainly enjoys a higher economic status than the head of a household of four who earns $10,000. Petitioner's statistics are deficient because they fail to take size of household into consideration.

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[6] Some courts have held that proof of "systematic exclusion" of an identifiable group is a prerequisite to establishing a statutory, as well as a constitutional, claim. See, *e.g.*, *United States* v. *Foxworth*, 599 F.2d 1, 3 (1st Cir. 1979). Because petitioner has failed to demonstrate either a substantial disparity in representation or systematic exclusion of any distinctive group, we find it unnecessary to address this question.

Blacks are also a cognizable group within the community. Petitioner's statistics indicate that in the Raleigh Division blacks constitute 26.3% of the population and 16.9% of those who serve (A. 1506). This represents an absolute disparity of 9.4% (a figure perhaps subject to reduction by elimination of children from the statistics). This Court has held, however, that underrepresentation by as much as 10% does not show purposeful discrimination necessary to support an equal protection claim. *Swain* v. *Alabama*, 380 U.S. 202, 208-209 (1965). Although the Court in *Duren* v. *Missouri*, *supra*, 439 U.S. at 368 n.26, noted that equal protection challenges to jury selection (as in *Swain*) are not entirely analogous to fair-cross-section claims—since in equal protection cases both disparate representation and discriminatory purpose must be shown, whereas in fair-cross-section cases a significant disproportion is sufficient in itself to show that prospective jurors do not reflect a fair cross section of the community—the Court did not suggest that the *amount* of disparity necessary to establish substantial underrepresentation was different in the two contexts. See *United States* v. *Maskeny*, 609 F.2d 183, 190 (5th Cir. 1980). Thus, petitioner's statistics fail to demonstrate that blacks, or any other distinctive group, are significantly underrepresented on jury venires in the Raleigh Division.[7]

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[7] Contrary to petitioner's contention (Pet. 11), the fact that 62% of eligible jurors are excluded under the Eastern District's plan because they have chosen not to vote does not by itself establish that any cognizable group is substantially underrepresented.

Moreover, petitioner's constitutional claim must be rejected for the additional reason that he has failed to show the "systematic exclusion" of any cognizable group from jury service. *Duren* v. *Missouri*, *supra*, 439 U.S. at 364. He alleges neither that any group is excluded by the random selection process, nor that it is prevented or discouraged from voting in the district. In every case in which this Court has invalidated a jury selection system that resulted in the exclusion of an identifiable group, the plan involved some device by which members of the group could choose to exclude themselves or could be deliberately excluded by those charged with the responsibility for jury selection. See, *e.g.*, *Duren* v. *Missouri*, *supra*; *Taylor* v. *Louisiana*, 419 U.S. 522 (1975); *Alexander* v. *Louisiana*, 405 U.S. 625 (1972). By contrast, the jury selection method employed in the Eastern District of North Carolina is objective and random, and does not permit the systematic exclusion of any group.

There is thus no merit to petitioner's contention that the voter lists used to identify potential jurors under the plan should have been supplemented from other sources. As the Tenth Circuit stated in *United States* v. *Evans*, 542 F.2d 805, 812 (1976), cert. denied, 429 U.S. 1101 (1977), "the circuits are in complete agreement that not only is the use of actual voter lists proper, but that neither the Act nor the Constitution require[s] that a supplemental source of names be added to voter lists simply because an identifiable group votes in a proportion lower than

the rest of the population." [8] In the absence of a conflict among the courts of appeals, this issue does not warrant review.

3. On the evening before trial, government witness William Thompson, the prior owner of the LADY ELLEN, was told by the prosecution to be present in the courtroom the following morning. He arrived approximately five minutes before court convened. Almost immediately, he recognized petitioner, known to him as "Jack Long," seated approximately three rows ahead of him. Thompson remained in the courtroom while the jury was selected during the morning session. That evening, Thompson was contacted by the prosecution and asked if he recognized anyone in the courtroom; he replied that he recognized "Jack Long" (A. 1275-1277). Petitioner contends (Pet. 13) that Thompson's subsequent in-court identification

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[8] In enacting the Jury Selection and Service Act, Congress recognized that disparities might result because a disproportionate number of members of a distinct group might choose not to register or vote. Nevertheless, Congress did not insist on supplementation to remedy such disparities.

> In a sense the use of voter lists as the basic source of juror names discriminates against those who have the requisite qualifications for jury service but who do not register or vote. This is not unfair, however, because anyone with minimal qualifications—qualifications that are relevant to jury service—can cause his name to be placed on the lists simply by registering or voting. No economic or social characteristics prevent one who wants to be considered for jury service from having his name placed in the pool from which jurors are selected.

H.R. Rep. No. 1076, 90th Cong., 2d Sess. 5 (1968). See *United States* v. *Brady, supra*, 579 F.2d at 1134.

of him should have been excluded because the pretrial confrontation was impermissibly suggestive. This claim is insubstantial.

The pretrial confrontation was not suggestive. When Thompson entered the courtroom there were ten to twelve persons on one side, who he later learned were prospective jurors, and approximately five or six persons on the other side (A. 1293-1294). From this substantial group, he immediately recognized petitioner as the man with whom he had discussed the sale of the LADY ELLEN. There is no reason to question the validity of his wholly spontaneous identification. In these circumstances, we submit that the pretrial confrontation was not impermissibly suggestive. See *Boyd* v. *Henderson*, 555 F.2d 56, 59-60 (2d Cir.), cert. denied, 434 U.S. 927 (1977).

In any event, even if the pretrial confrontation was suggestive, it did not taint Thompson's subsequent in-court identification, since that was based on a reliable independent source. See *United States* v. *Crews*, No. 78-777 (Mar. 25, 1980), slip op. 9-10 & n.18; *Manson* v. *Brathwaite*, 432 U.S. 98, 114-116 (1977); *Neil* v. *Biggers*, 409 U.S. 188, 199-201 (1972). Thompson testified (A. 1268-1272) that he had observed petitioner when petitioner was in Bayou LaBatre in December 1977 and then again in January 1978. On the first occasion, petitioner was constantly in Thompson's shop for one or two days. Thompson also observed petitioner at close range during a four to five hour trip aboard the LADY ELLEN, when the only other person present was Thompson's brother-in-law.

On the second occasion, Thompson observed petitioner around his shop for at least seven days, during which he sometimes talked to petitioner face-to-face. Moreover, when asked by the court whether his identification would be based on his recollection of events in 1977 and early 1978 or on the pretrial confrontation, Thompson replied, "It is based on the man I knew in Bayou LaBatre as Jack Long" (A. 1298). Accordingly, any suggestiveness in the pretrial confrontation plainly did not give rise to an unreliable in-court identification.[9]

4. At trial, Breslin testified (A. 899) that prior to the voyage he and his crew stayed at a Mobile, Alabama, motel at petitioner's expense. To corroborate this testimony, the government introduced into evidence the motel registration card completed by Breslin, upon which was entered the license number of the rental car driven by petitioner (A. 900-902). Petitioner contends (Pet. 7, 13-14) that the information on the registration card was unreliable and should have been excluded because his license number had been substituted on the card for another license number that had been crossed out. But the change in license numbers was clearly explained by the evidence. A motel clerk testified (A. 1200) that "[o]ur motel is so constructed that when they pass

[9] Since the in-court identification was derived from an independent source, any violation of petitioner's Sixth Amendment right to counsel during the pretrial confrontation did not warrant exclusion of the identification testimony at trial. See *United States* v. *Wade*, 388 U.S. 218, 240-241 (1967).

by, we can double-check the license numbers on the car. If not, we go out and check them. When we double-check the numbers and it is not the correct number, we put the correct number down. That is for security reasons." This testimony was consistent with Breslin's statement (A. 899-900) that after giving a correct description of the rental car on the registration card, he altered the license number at petitioner's suggestion. Accordingly, the alteration of the numbers was sufficiently accounted for and the card was properly admitted into evidence.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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APRIL 1980

☆ U. S. GOVERNMENT PRINTING OFFICE: 1980 317165 276